"In order to bring a case within section 409, it is.....necessary to show that property was entrusted, to a public servant and that he accepted the property entrusted, being in his public capacity required or authorised to accept it. Otherwise in accepting the property he acts as a mere volunteer, and is not entrusted with it in his capacity of a public servant. It is not sufficient to show merely that a person delivered the property to him because he was a public servant. The motive which induced the person to deliver the property cannot alone determine the quality of the trust created. The mistaken belief of the person delivering the property or of the person accepting it, or of both, that the latter was authorised to receive it in his public capacity cannot alter the facts and supply the deficient and requisite authority so as to convert simple breach of trust into breach of trust by a public servant." (*Per* Plowden, J.; in *Bhag Singh* (1876) P.R. No. 24 of 1876, 46 quoted in "The Law of Crimes" (*Ratanlal* 14th edition at page 999).

I therefore alter the finding to a conviction under section 406 Penal Code.

As regards the sentence, I consider it excessive, even if the conviction had been rightly made under section 409, Penal Code. The accused is an old man, in bad health, has a long, clear record of service; the sums of money are small, and restitution has been made.

I alter the sentence to a fine of $30/- or in default one month's simple imprisonment.

Finding altered. Sentence reduced.

[APPELLATE CRIMINAL JURISDICTION]

AITKEN, J.

October 1, 1937.

TAN YONG SIN.....**Appellant**

v.

PUBLIC PROSECUTOR.....**Respondent**

[PERAK MAGISTRATE'S CRIMINAL APPEAL No. 36 of 1937]

Opium and Chandu Enactment (Cap. 134) section 9 (b)—Mens rea.

The prohibition in section 9 (b) of the Opium and Chandu Enactment (Cap. 134) is absolute and *mens rea* is not a necessary element in an offence under section 9 (b) or indeed in any of the offences created by section 9

G. H. Gartside for the appellant.

I. W. Blelloch, Deputy Public Prosecutor, for the respondent.

AITKEN, J.—In this case the appellant was convicted at Parit Buntar, on the 21st day of May last, of having chandu, other than Government chandu, in his possession at Parit Buntar about 7 o'clock in the forenoon of the 2nd of that month, contrary to the provisions of section 9 (b) of the Opium and Chandu Enactment.

He has appealed against that conviction on the ground that *mens rea* is a necessary element in all the offences created by this section 9 (b) of the Opium and Chandu Enactment, and that there was no evidence before the learned Magistrate to justify the inference that the appellant knew that the chandu in question was concealed in a package at the back of his motor car. Throughout the trial before the learned Magistrate it had been contended that the chandu in question had been planted in the package where it was found by an enemy of the appellant, who had thereupon informed the Customs Officers what they would find if they searched that particular package.

The appellant himself, and two others, gave evidence in support of that contention; and the circumstances related by them, which are not really in dispute, do show (a) that it would have been quite easy to plant the opium in question in the particular package where it was found, and (b) that the manner in which the appellant was stopped and searched is quite consistent with the appellant's denial of any knowledge of the opium found in his possession.

The first question I have to decide is this: is *mens rea* a necessary element in any of the offences created by this section 9 (b) which reads as follows:—

> "Subject to the exceptions specified in Section 46, no person other than the Commissioner shall import into or export from the Federated Malay States any chandu or have in his possession any chandu other than Government chandu."

The exceptions specified in section 46 of the Enactment have no bearing on the facts of this case, so that the only words I am called upon to interpret are these—"no person shall have in his possession any chandu other than Government chandu". Is that an absolute prohibition, regardless of the state of mind of the possessor; or is it necessary to prove guilty knowledge on his part?

Having regard to the object of the Enactment which is for the stringent control of opium in all its various forms, with a view to the eventual suppression of its use except under medical advice and supervision; and also having regard to the grammatical and ordinary meaning of the words in question; I have come to the conclusion that the prohibition is absolute, and that *mens rea* is not a necessary element in this offence, or indeed in any of the offences created by section 9 of the Enactment. There are, of course, many cases that could be cited on the point, but it is sufficient for the purposes of this judgment to point out that the ancient presumption of *mens*

rea being a necessary element in every criminal offence has been much weakened in modern times, and that the rule now is to consider the object of the statute and the ordinary grammatical meaning of the language employed. To my mind the absence of the word 'knowingly' from section 9 of the Opium and Chandu Enactment is very significant, since it is so frequently employed by legal draftsmen to indicate that *mens rea* is a necessary element in a criminal offence of the same nature as those created by this section.

It is clear, however, that the state of mind of any person convicted of an offence under section 9 should be taken into consideration in assessing the punishment to be imposed; and it seems to me that a reasonable possibility of there being an absence of such *mens rea* should be taken into consideration as well as the probability or certainty of such absence. Of course, a mere possibility, even though reasonable, will not operate in favour of an accused person to the same extent as a certainty or even a probability: it is all a question of degree. To what extent it will so operate is within the discretion of the Magistrate: I am only concerned to point out that he should take it into consideration in the proper exercise of that discretion.

Now in this particular case, though apparently the learned Magistrate considered that there was a reasonable doubt as to whether the appellant had any knowledge of the chandu found in his package, yet nevertheless he seems to have taken the view that unless the appellant could prove conclusively that he had no such guilty knowledge, he was to be punished on the footing that he had it.

For this reason I think that the appellant has made out a case for a re-trial, in order that the principle I have just enunciated may be applied in assessing the punishment to be inflicted for the offence he has, perhaps unwittingly, committed. Such a course would, however, inevitably involve much inconvenience and expense; and I have therefore decided to re-assess his punishment myself in the light afforded by the record of this case. The appellant's conviction will stand, but the fine inflicted on him will be reduced from $50 to $10, and the sentence of rigorous imprisonment in default of payment will also be reduced from one month to one week.

Appeal dismissed but sentence varied.

[APPELLATE CRIMINAL JURISDICTION]

CUSSEN, J.

November 8, 1937.

LEE YEE HENG.....Appellant

against

PUBLIC PROSECUTOR.....Respondent

[SELANGOR MAGISTRATE'S CRIMINAL APPEAL No. 74 of 1937]

Opium and Chandu Enactment (Cap. 134)—Rule 17 of Registration of Chandu Smokers Rules—Sale of Chandu—Record of—Register—Power of Commissioner to impose the duty of making the record.

Rule 17 of the Registration of Chandu Smokers Rules does not require that every separate purchase of chandu by a registered smoker should be separately recorded in the register. It is sufficient if one entry is made of the total amount of his purchase in one day.

The rule does not give the Commissioner power to impose the legal duty of recording purchases in a register.

MAGISTRATE'S CRIMINAL APPEAL.

J. T. Tosswill for appellant.

M. C. Hay, Acting Deputy Legal Adviser, for Public Prosecutor.

CUSSEN, J.—The appellant was charged in the Court of the Magistrate, Kuala Lumpur, with an offence under Rule 17 of the Registration of Chandu Smokers Rules, punishable under section 34 of the Opium and Chandu Enactment (Chapter 134). He was convicted and fined $50/- or in default two months rigorous imprisonment.

The charge was as follows:—

> "That on July 7th, 1937, you being Clerk-in-Charge of Ampang Government Chandu Shop failed to record in the register of such shop every purchase of chandu from such Government Chandu Shop and that you thereby committed an offence under Rule 17 of the Registration of Chandu Smokers Rules, punishable under Section 34 (Chapter 134)."

Rule 17 reads:

> "Every purchase of chandu from a Government Chandu Shop shall be recorded in a register to be kept at such shop and also in the registration card of the registered smoker or authorised consumer in the manner required by the Commissioner."

The case for the prosecution is that on 7th July, 1,797 tubes of chandu were sold at the Ampang Government Chandu Shop, but that only sales to the amount of 745 tubes were recorded in the "register" and that, therefore, the appellant has omitted to record the sale of 1,052 tubes,